Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Regulatory Treatment for	)	CS Docket No. 02-52
Broadband Access to the Internet Over	)	
Cable Facilities	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Only a few years ago, there was no such thing as high-speed broadband access to the Internet. Cable systems were designed primarily for the one-way transmission of video programming. Telephone companies had the technological capability to provide DSL service but, without any competitive spur from any other facilities-based provider of high-speed access, chose not to do so.

It was cable operators who, with a massive, unsubsidized investment of private capital, upgraded and transformed their facilities in order to provide high-speed cable modem service and other digital offerings. With no guarantee that the service would be technologically feasible or profitably marketed to consumers, cable operators proceeded to roll Cable Internet access has been just that – access to the Internet and everything that is available on the Internet. Cable modem service does not block access to Internet content. To the contrary, its high-speed capability enables subscribers to enjoy Internet content and services that were never before and would not otherwise have been available. Increasingly, cable systems are providing subscribers with a choice among several

Internet service providers ("ISPs"). This process has all taken place in the current regulatory environment, in which the Commission has refrained, and cities and states have been constrained by the courts, from regulating cable modem service.

It's hard to see anything but good news in these developments, but some commenting parties see nothing but dark clouds. On the one hand, some parties – primarily ISPs and self-styled consumer representatives – view cable modem service as a service that will constrict the availability of content on the Internet unless cable operators are required to provide all ISPs access to their facilities. On the other hand, local franchising authorities and their representatives insist that unless they are allowed to regulate the manner in which cable modem service is provided, and unless they are permitted to siphon off a portion of cable modem revenues as additional "rent" for the use of public rights-of-way, consumers will suffer and local governments will be "unable to perform vital tasks that the federal government is either ill-equipped or simply not empowered to perform."[1]

To a large extent, what these doomsayers are quarreling with is the Commission's determination that cable modem service is neither a telecommunications service (which might have subjected it to Title II regulation) nor a cable service (which might have permitted cities to regulate it and collect franchise fees on its revenues) but is, instead, an interstate "information service." Indeed, the proponents of a multiple ISP requirement and the local franchising authorities all spend a considerable number of pages arguing against that determination, even though it is not at issue in this proceeding. The focus of

[1] Comments of Alliance of Local Organizations Against Preemption ("ALOAP") at iv.

this proceeding is on the regulatory implications of that determination – which, as we showed in our initial comments, are largely dictated by the statute.

Because it has determined that cable modem service is not a telecommunications service, the Commission has no authority to impose on it the common-carrier requirements of Title II. Moreover, the Commission has no ancillary jurisdiction under the Communications Act to impose a multiple ISP requirement on cable modem service not only because such a requirement is not necessary to fulfill any of the Commission's statutory responsibilities but also because it would be inconsistent with the statutory federal policy against regulating Internet services.

Because cable modem service is not a cable service, cities and states have none of the statutory authority that Title VI gives them to regulate cable service. Moreover, cities and states are generally preempted from regulating the provision of interstate information services.

While local governments may generally manage the use of their rights-of-way, they are precluded by law from requiring a separate franchise for the provision of cable modem service or from assessing additional franchise fees on the revenues from such service. Cable operators use the same facilities and rights-of-way for the provision of both cable service and cable modem service. Pursuant to Section 621 of the Act, franchised cable operators already have the right to use those rights-of-way. And cable operators already pay substantial fees in return for the use of such rights-of-way. Pursuant to Section 622, franchising authorities may charge up to five percent of a cable operator's gross revenues from the provision of cable service – an amount that has grown exponentially over the years and that vastly exceeds regulatory costs and expenses

associated with managing rights-of-way. But they may not charge additional fees based on revenues from the provision of a service that, like cable modem service, is not a cable service.

Although the Commission's determination that cable modem service is not a telecommunications service is not at issue in this proceeding, the proponents of a forced ISP access requirement discuss at length why, in their view, the public interest would have been better served if cable modem service were subject to the common-carrier requirements of Title II. Their cost-benefit analysis is wholly one-sided: They ignore the substantial costs of regulation, which were identified and discussed by NCTA and numerous other parties in their initial comments, and focus solely on the supposed benefits – which are illusory.

Their principal concern seems to be that cable operators will restrict access to Internet content, and that a mandatory access requirement will somehow increase the content available to cable modem users. But they provide no evidence that there has been any such restriction on content and no reason to believe that there ever will be. Indeed, they cite more examples of ISPs that allow subscribers to filter and restrict access to content than of ISPs that provide additional content not otherwise available to Internet users. Also, we argued in our initial comments that a multiple ISP requirement will not promote facilities-based competition, since there is no reason to believe that the ISPs seeking access have any intention of deploying their own facilities – and nothing in their comments suggests otherwise.

Some telephone companies argue that, for the sake of "regulatory parity," cable modem service and DSL service should be subject to the same regulatory regime. For the

most part, they urge the Commission to treat both services as information services with no common carrier or other multiple ISP access requirements. Whether telephone companies should be freed from their Title II constraints when they provide DSL service is not the issue in this proceeding, nor is it an issue on which NCTA has taken a position in the related proceeding on the regulatory status of wireline broadband access to the Internet. We do, however, take issue with the suggestion by some companies that if DSL service remains subject, in whole or in part, to Title II regulation, cable modem service should be subjected to equivalent constraints.

As we pointed out in our initial comments, telephone companies are subject to those Title II constraints for a multitude of reasons related to their unique history, system architecture and past conduct – none of which apply to cable. Imposing those constraints – and the costs associated with them – on cable for no reason other than to achieve regulatory parity will, as we showed, make consumers unequivocally worse off by raising the price or lowering the quality of cable modem and DSL service.

I. THE COMMISSION LACKS "ANCILLARY JURISDICTION" TO IMPOSE A MULTIPLE ISP ACCESS REQUIREMENT ON CABLE OPERATORS.

Those commenting parties who believe that cable operators should be treated, in essence, as common carriers required to provide access to multiple ISPs complain vigorously about the Commission's determination that cable modem service is not a telecommunications service subject to Title II of the Communications Act. This is understandable, because, as NCTA showed in its initial comments, the Commission has no ancillary jurisdiction under Title I to impose such a requirement. Indeed, in focusing their attention almost exclusively on what the Consumer Federation of America, et al. ("CFA") characterize as the Commission's "muddleheaded" refusal to classify cable

modem service as including a telecommunications service,[2] these parties implicitly – and, in some cases, explicitly – acknowledge that the classification of cable modem service as an interstate information service effectively precludes the imposition of a forced access requirement.

Thus, CFA concedes that "it will be extremely difficult to implement [forced access] under Title I, precisely because [the FCC] lacks a clear legal basis to require non-discriminatory interconnection and carriage."[3] Similarly, the State of California and the California Public Service Commission "questions how the FCC could regulate cable modem service under its ancillary jurisdiction under Title I if the FCC believes that cable modem service is entirely an information service."[4]

To the extent that any parties suggest that the Commission does have jurisdiction to regulate cable modem service under Title I, they largely ignore the necessary pre-conditions to the exercise of such Title I jurisdiction. EarthLink, for example, argues that because cable modem service is provided "via telecommunications" and consists of "communication by wire," it is within the scope of the Commission's statutory jurisdiction, which, under Section 2(a), includes "all interstate . . . communications by wire."[5] But, as NCTA pointed out in its initial comments, the mere fact that a service is within the broad jurisdictional scope of Section 2(a) does not confer authority on the Commission to regulate that service in any particular manner.

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2 See Comments of Consumer Federation of America, et al. ("CFA") at 7.

3 Id. at 41.

4 Comments of the People of the State of California and the California Public Utilities Commission ("California") at 4 n.6.

5 See Comments of EarthLink, Inc. at 13-14. See also Comments of Center for Digital Democracy, et al. at 16-17.

Thus, as the State of California, which favors forced ISP access, acknowledges,

> in California v. FCC, 905 F.2d, 1217, 1240 n.35, the Ninth Circuit made clear that Title I does not contain a specific grant of jurisdiction to the FCC. The FCC's Title I authority over cable modem service must be ancillary to the exercise of specific statutory responsibilities contained in another title of the Act. Id. Other than citing general goals in the Act, the FCC has not identified any specific responsibilities to which its assertion of authority over cable modem service would be ancillary.[6]

The Association of Communications Enterprises ("ASCENT") suggests that the Commission might rely on Section 706 of the Telecommunications Act of 1996 as a source of ancillary jurisdiction over cable modem service. But, as several parties point out, Section 706 is, if anything, a mandate not to impose a forced access regime on the development of cable modem service. Verizon and the United States Telecom Association, for example, both argue that Section 706 provides an affirmative statutory basis for the Commission to deregulate the provision of broadband Internet access by incumbent local exchange carriers even if those services would otherwise be subject to Title II regulation.[7]

Even CFA, which argues that Section 706 does not mandate or justify forbearance of Title II regulation,[8] does not contend that Section 706 provides a source of ancillary

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[6] California Comments at 4 n.6 (emphasis added).

[7] See Comments of Verizon at 17; United States Telecom Association ("USTA") at 7-8.

[8] CFA's argument on forbearance is misconceived. In the Notice of Proposed Rulemaking, the Commission tentatively concluded that if, as the result of judicial determinations, it turns out to be the case that cable modem service must be deemed a "telecommunications service" in some jurisdictions, the Commission should forbear from imposing Title II regulation on such service. See Notice, ¶ 95. CFA (and EarthLink) argue at length that the Commission has not followed the proper procedures nor can it make the necessary findings to justify forbearance pursuant to Section 10 of the Act. See CFA Comments at 14-20; EarthLink Comments at 15-19.

NCTA's discussion, in its initial comments, of the costs and benefits of imposing common-carrier type regulation of cable modem service demonstrate that the Commission has ample basis for determining that the prerequisites for Section 10 forbearance are met. Indeed, what we showed was not only that such regulation "is not necessary for the protection of consumers," as required by Section 10, but that it would harm consumers by deterring deployment, raising the price, and/or diminishing the quality of

jurisdiction to impose Title II-type regulation on cable modem service if cable modem service is not a telecommunications service. Indeed, CFA's analysis supports precisely the opposite conclusion. Section 706 directs the Commission to conduct regular inquiries to

> determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[9]

As CFA correctly points out, "[t]he Commission has made repeated inquiries into the deployment of advanced telecommunications capabilities and never arrived [at] the negative answer that would support action under Section 706."[10] To the contrary, the Commission has repeatedly found that advanced telecommunications capability is being deployed in a "reasonable and timely fashion."[11] CFA's point is that, in light of this finding, the Commission has no mandate to act under Section 706. In that case, a forced access requirement cannot be deemed necessary to fulfill the Commission's Section 706

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high-speed Internet access. And our cost-benefit analysis showed that avoiding such regulation would clearly be "consistent with the public interest" – since the substantial costs would far outweigh the virtually non-existent benefits.

Finally, it is wholly reasonable for the Commission to determine at this time that Title II regulation is unnecessary to ensure that, to the extent that cable operators are deemed to be providing a telecommunications service as part of their cable modem service to subscribers, the operators' charges and practices will be "just and reasonable" and "not unjustly or unreasonably discriminatory." As we showed, this is both a nascent and a competitive marketplace, and both of these characteristics constrain the ability and incentive of cable modem service providers to engage in anticompetitive conduct as they attempt to maximize the value of their service to new and existing customers.

[9] Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes at 47 U.S.C. § 157 (emphasis added).

[10] CFA Comments at 13.

[11] See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd 2844, 2848 (2002).

responsibilities, and Section 706 cannot be a source of ancillary jurisdiction to impose such a requirement.

II. EVEN IF THE COMMISSION HAD AUTHORITY TO REGULATE CABLE MODEM SERVICE, A FORCED ACCESS REQUIREMENT WOULD NOT SERVE THE PUBLIC INTEREST.

A. There Is No Basis for the Doomsday Scenario Suggested by the Proponents of Forced Access.

Although they either concede or ignore the jurisdictional obstacles to imposing a forced access requirement on providers of cable modem service, the proponents of such a requirement seek to persuade the Commission that such a requirement would serve the public interest. Indeed, they would have the Commission believe that, absent such a requirement, cable modem service will ruin the Internet. CFA, for example, assures the Commission that "[d]ominant facility owners will become gatekeepers, driving customers to affiliated content suppliers, and protecting incumbent market power over services by foreclosing or controlling innovations that threaten to compete with their core products, thereby slowing innovation."[12] Cable operators will, according to the American Civil Liberties Union, become "Lords of the Internet" and will "restrict customers' options and interfere with their free access to information."[13]

So far, of course, the advent of cable modem service has had precisely the opposite effect. Not only do cable modem subscribers have access to all the content that is generally available on the Internet, but also the deployment of cable modem service, with its high-speed capability, has greatly expanded the amount and range of content that is available. High-speed cable Internet access enables subscribers to view, listen to,

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[12] CFA Comments at 23.

[13] Comments of the American Civil Liberties Union at 3.

interact with, or download content that would not have been practically available with narrowband dial-up access. Graphics-intensive web pages that would have taken minutes to receive can be accessed almost instantaneously. Music and video material can be streamed with higher fidelity or downloaded in seconds or minutes instead of hours.

CFA contends that "[t]he dominant firms [providing cable modem service] have failed to develop applications and content that uniquely exploits the capabilities of high-speed networks."[14] But someone – and, in most cases, that someone is neither the cable operator's affiliated ISP nor any other unaffiliated ISP – is unquestionably developing such applications and content. And subscribers to cable modem service have access to them.

ISPs sometimes bundle their own unique content, or use their home pages to promote the Internet content of others, along with their provision of Internet access. To the extent that this bundling of content with access is attractive or convenient to consumers, many cable operators are choosing voluntarily to offer their cable modem subscribers a choice among several ISPs. But the notion that providing or not providing multiple ISPs has any significant effect on the amount or quality of content that is generally available on the Internet is ridiculous.

First of all, the amount of content provided by or promoted by ISPs is an infinitesimally small portion of the total content available on the Internet. If availability of content on the Internet depended on its being bundled with Internet access, most of the currently available content would not exist.

[14] CFA Comments at 16.

Second, the content provided by ISPs is generally available on the Internet to all cable modem users. Some ISPs may choose to charge a fee to Internet users other than their own subscribers for access to such content (although most do not), but many non-ISP websites also charge for access to their content. This is simply a marketplace judgment and has nothing to do with whether the content is bundled with Internet access.

Third, most cable-affiliated ISPs not only allow access to all Internet sites; they also allow subscribers to bypass their own content and go directly to the Internet. This means that their ability even to promote certain favored content is limited. The mere fact that a cable-affiliated ISP's home page promotes or links to particular content providers' sites would hardly be likely to impair the "competitive, consumer-friendly, innovation rich environment we have come to know and love on the Internet,"[15] even if all of that company's cable modem subscribers were required to use that home page. But the fact that cable modem subscribers can generally choose any website on the Internet as their home page makes the doomsday claims of CFA, the ACLU and other proponents of forced access even more far-fetched.

Just as cable modem subscribers have access to all content on the Internet, they also generally will have access to all applications that are available. Some parties have expressed concerns, based on the terms and conditions included in some subscriber agreements, that cable operators can be expected to limit or prohibit certain applications "that might compete directly with their core video services."[16] These concerns are misplaced. The limited restrictions that have been imposed while cable operators are developing and rolling out cable modem service do not have any anticompetitive purpose

[15] Id. at 36.

or effect. To the contrary, they appear to be reasonable attempts to prevent individual customers from imposing excessive burdens on the system to the detriment of other residential customers.

For example, some cable operators have restricted subscribers from connecting and operating their own servers. This is clearly meant to prevent excessive bandwidth usage that would adversely affect the majority of residential subscribers. Cable's upgraded networks were designed to provide Internet service primarily to residential customers. Such customers' data transmission, it was assumed, would be largely asymmetrical, with much more data traveling downstream to the customer than upstream from the customer. Running servers on such a network would result not only in much higher than normal bandwidth usage but also much more upstream usage than the system was designed to handle.

The resulting adverse effect on the ability of most residential subscribers to access and download information from the Internet would not only be unfair but would diminish the attractiveness and utility of broadband access as a high-speed alternative to narrowband dial-up access. One way to address this problem is for cable operators to offer its heaviest users a separate tier of service that is designed to accommodate the use of servers and other high-bandwidth applications. The use of tiering creates a structure whereby the heaviest users pay more for the service and the burden that their usage patterns place on the network, while lighter users pay less. A number of cable operators are providing tiered service or engaging in tiering trials to determine the technical,

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[16] Id. See also Comments of High Tech Broadband Coalition at 10-13.

operational and business feasibility of offering multiple levels of service designed to meet the different needs of their subscribers.

An alternative would be to engineer the network to accommodate heavy users by reducing the number of subscribers per node; however, this solution would make the provision of service to the high-bandwidth users more costly to the operator and ultimately to customers. Accordingly, some operators either do not permit bandwidth-intensive uses, such as the running of servers, by residential subscribers or (as tiering becomes more feasible and scalable) allow such bandwidth-intensive uses only by subscribers to an upgraded service at an extra charge.

Virtual Private Networks ("VPNs") are restricted for a different technical reason. To operate effectively, VPNs require a static IP address – i.e., an Internet address that remains the same every time the user boots up his or her computer and connects to the Internet. But, for a variety of technical reasons, cable operators generally assign dynamic IP addresses – i.e., addresses that change each time the user connects to the Internet – to residential subscribers.

Static assignments are especially inefficient insofar as they require far more extensive use of scarce IP addresses than dynamic assignments. It would not be feasible to assign (and cable operators probably could not obtain) static IP addresses for all their residential subscribers. It is possible to assign such addresses to some users, but there are significant costs and inefficiencies associated with managing a system where some users have static addresses and others have dynamic addresses (as well as costs of obtaining scarce static IP addresses). For this reason, static addresses are generally assigned to

commercial users, who are likely to run VPNs or otherwise need such addresses. But such addresses cannot also be made available to residential users.

There is no reason why these or any similar restrictions identified by commenting parties should be viewed as "troubling."[17] The point of managing use of the cable modem service is to ensure that all subscribers can enjoy the benefits of high-speed access to the ever-expanding range of content and services on the Internet – not to restrict such access. Cable operators understand the technical capabilities and limitations of their networks and are best positioned to establish reasonable rules of the road to maximize the attractiveness and efficient use of cable modem service – and that is what they are doing.

Some parties – the same parties who are worried that cable-affiliated ISPs will stifle the availability of content on the Internet – also suggest that unaffiliated ISPs might provide server-based applications that are not provided by the affiliated ISPs. Ironically, the only such server-based applications identified by these parties are filtering systems – i.e., applications that restrict the content that is available to subscribers.[18] Some subscribers who want to prevent certain content from being accessible on their computers might want such filtering software, precisely because cable-affiliated ISPs provide unrestricted access to all Internet content. But filtering software need not be server-based, and, in fact, there are many filtering applications available for installation on home computers to restrict content when surfing the web.[19]

In sum, the proponents of forced access and mandatory multiple ISP requirements greatly overstate the illusory benefits of such requirements. Meanwhile, they simply

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[17] See High Tech Broadband Coalition Comments at 10.

[18] See, e.g., CFA Comments at 32; Comments of Center for Digital Democracy, et al. ("CDD") at 15.

ignore the costs. In NCTA's initial comments, we identified the many ways in which a multiple ISP access requirement would impose substantial costs on regulators, cable operators and consumers. We showed – and submitted a paper by Bruce Owen of Economists Incorporated and Stanford University confirming – that access regulation would (1) require a costly, complex and intractable regulatory regime; (2) have technological, operational and financial effects that would adversely affect the cost and quality of cable modem service; (3) deter investment and impede deployment of facilities and services; and (4) have unintended side effects.[20] Several cable operators have, in their comments, identified similar adverse effects of regulation.[21]

Costs such as these, as the Commission has recognized,[22] would need to be taken into account even if there were significant benefits associated with forced access regulation – which, as we have shown, there are not. Yet the proponents of regulation have nothing to say about this side of the cost-benefit analysis. They make no effort to show that the benefits they tout would outweigh the costs of regulation, and fail even to acknowledge that any such costs exist.

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19 See, e.g., "Your Guide to Filtering Software," http://familyinternet.about.com/library/filter/blfilterindex.htm

20 See NCTA Comments at 15-27.

21 See, e.g., Comments of Comcast Corporation at 25-27; Comments of Cablevision Systems Corporation at 7-9; Comments of Cox Communications, Inc. at 23-35; Comments of the American Cable Association at 9-11.

22 See Notice of Proposed Rulemaking, ¶ 90.

B. "Regulatory Parity" Is Not a Defensible Reason for Regulating Cable Modem Service.

Some parties – primarily local exchange carriers – argue that, as a matter of public policy, the Commission should adopt the same regulatory requirements for cable modem service and DSL service. Indeed, SBC Communications goes so far as to suggest that "[e]stablishment of a consistent regulatory framework for cable and wireline broadband Internet access services is not just a matter of 'desirability' – it is essential as a matter of law and policy."[23]

For the most part, these parties argue that the Commission should treat cable modem service and DSL service the same by deregulating both services and subjecting neither one to mandatory multiple ISP access requirements. But some suggest that if the Commission ultimately decides to continue to subject DSL service to Title II regulation or imposes any common carrier-like requirements on DSL service under Title I, it should – and would be required to – impose identical regulation on cable modem service.[24]

But, as we showed in our initial comments, even if DSL service were to remain subject to regulation, "regulatory parity" would not be a sound or defensible reason to regulate cable modem service. We take no position as to whether DSL service should remain subject to regulation. But, as we showed at length, there are significant differences – historical, technological, and economical – between cable systems and

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[23] Comments of SBC Communications Inc. at 10 (emphasis in original). See also Comments of Verizon at 17 ("The Commission must treat local telephone company broadband as it treats cable modem service"); USTA Comments at 7 ("Wireline broadband Internet access service and cable modem service should receive the same regulatory treatment"); Comments of BellSouth Corporation at 2 ("The regulation of all broadband services must be the same").

[24] See, e.g., USTA Comments at 9 ("Computer II and Computer III requirements should not be imposed on any broadband providers. Nonetheless, should the FCC continue to apply Computer II and Computer III requirements on ILECs providers of broadband, the requirements should be equally applicable to cable modem service"). See also BellSouth Comments at 2.

telephone networks.[25] These differences have resulted in different statutory and regulatory regimes, and whether or not continued regulation of the telephone companies' provision of DSL service is appropriate depends on whether the unique factors that resulted in Title II regulation in the first place justify regulation in this case.

It is possible, in other words, that continued regulation of DSL might be justified on the basis of particular policy concerns that have no applicability to cable operators and their provision of cable modem service. Alternatively, it may be that, as the telephone companies contend, there is no policy basis for regulating DSL service and yet it remains subject to regulation. In neither case would the public interest be served by imposing similar regulation on cable modem service.

As we showed in our initial comments, regulating cable just for the sake of regulatory parity would only make consumers worse off by increasing the price, or diminishing the quality, of high-speed Internet access provided by DSL and cable. SBC itself points out that "there are significant costs associated with multiple ISP access that ultimately must be passed on to consumers in the form of higher rates for broadband service."[26] Moreover, Professor Owen showed that if regulation has the effect of raising cable's prices, this will in turn result in higher DSL prices – higher even than they would have been if DSL was regulated and cable was not.[27]

Thus, whether or not there is any justification for imposing a multiple ISP access requirement on telephone companies, imposing such a requirement on cable operators in the name of regulatory parity makes no sense. Raising the price of high-speed Internet

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[25] See NCTA Comments at 36-42.

[26] SBC Comments at 18.

[27] See Owen, "Forced Access to Broadband Cable," Attachment to NCTA Comments, at ¶ 52.

access would not be good for those consumers who have already chosen to purchase it – and it would be an especially bad idea to the extent that it slowed down the growth rate of this important service.

III. STATE AND LOCAL GOVERNMENTS HAVE MINIMAL AUTHORITY TO REGULATE CABLE MODEM SERVICE.

Much of the prologue to this proceeding – in particular, the court decisions addressing whether cable modem service is a cable, telecommunications or information service – involved municipal efforts to impose forced access requirements on providers of cable modem service. But the cities' concerns in this proceeding appear to be focused elsewhere. We argued in our initial comments that state and local governments have no authority to impose forced access requirements or otherwise regulate the provision of this interstate information service. The cities do not seriously dispute this point. They assert, however, that local governments do have authority to require additional franchises and to assess additional fees for the use of public rights-of-way to provide cable modem service.

We did not dispute the right of local governments to manage the use of public rights-of-way. But, as we showed, an additional franchise is not necessary for this managerial function. Moreover, whether the fees that state and local governments would like to assess on cable operators for their use of public rights-of-way are characterized as regulatory fees, rent or anything else, they are statutorily limited by Section 622 and by the Internet Tax Freedom Act – and those provisions bar the assessment of such fees on the provision of cable modem service.

A. Cable Operators Do Not Need an Additional Franchise To Use the Public Rights-of-Way for the Provision of Cable Modem Service.

The Alliance of Local Organizations Against Preemption ("ALOAP") goes to great lengths to establish the proposition that local franchising authority "does not depend on an affirmative grant from the federal government particularly as to matters pertaining to the use, occupancy and terms and conditions for use and occupancy of the public rights-of-way. Instead the reverse is true, and a clear and affirmative statement is required to preempt local authority."[28] But what the local governments fail to acknowledge is that Congress has clearly and affirmatively provided that when a cable operator obtains a franchise from a state or local government to provide cable service, the operator needs no additional franchises to use the cable system that occupies the public rights-of-way for any other purpose.

As NCTA explained in its initial comments, Section 621(a)(2) specifically provides that any franchise granted to a cable operator pursuant to Title VI "shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses. . . ."[29] Nobody disputes that cable modem service is provided over the same facilities as cable service – i.e., that it is provided over the franchised cable system. Nothing in the Act deprives local governments of their authority to require cable operators to obtain their permission to use and occupy public rights-of-way. But once a local government has granted such permission in the form of a

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[28] ALOAP Comments at 29.

[29] 47 U.S.C. § 541(a)(2).

cable franchise pursuant to Section 621, the cable operator needs no further permission to use the rights-of-way to construct and operate its cable system.

ALOAP's reliance on City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999), is misplaced.[30] In that case, the court held that local governments may, in their discretion, require an operator of an "open video system" ("OVS") to obtain a franchise even though the Communications Act specifically exempts OVS operators from the provisions of Section 621 of the Act, which require all cable operators to obtain a franchise. The case merely confirms at most that local governments have authority, unless preempted, to require permission for the use and occupancy of public rights-of-way by an entity that has not already received such permission – such as an entity other than a franchised cable operator who seeks to use the public rights-of-way solely for the provision of Internet access service.

ALOAP's reliance on Section 621(b)(3)(A) of the Communications Act is similarly misplaced. That provision, which was added to Section 621 by the Telecommunications Act of 1996, states that a cable operator "shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services."[31] According to ALOAP, "[t]hat provision would have been wholly unnecessary had Congress believed that a grant of a franchise inherently exempts a cable operator from a duty to obtain additional authorizations to provide services other than cable services."[32]

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[30] See ALOAP Comments at 27.

[31] 47 U.S.C § 541(b)(3)(A).

[32] ALOAP Comments at 62-63.

But that analysis ignores the context in which the provision was added. The overall thrust of the 1996 Act was to remove barriers to the competitive provision of telecommunications services. As the legislative history makes clear, Congress did not believe that local franchising authorities ever had authority to regulate such services – under Title VI or elsewhere. It enacted the amendments not to remove the authority of municipalities to require a separate franchise for the provision of telecommunications services but to clarify that municipalities never had such authority:

> The intent of this provision is to ensure that regulation of telecommunications services, which traditionally has been regulated at the Federal and State level, remains a Federal and State regulatory activity. The Committee is aware that some local franchising authorities have attempted to expand their authority over the provision of cable service to include telecommunications service offered by cable operators. Since 1934, the regulation of interstate and foreign telecommunications services has [been] reserved to . . . the Federal Communications Commission; the State regulatory agencies have regulated intrastate services. It is the Committee's intention that when a person, whether it is a cable operator or some other entity, enters the telephone exchange service business, that it should be subject to the appropriate regulations of Federal or State regulators.[33]

Similarly, Congress could not have meant to allow franchising authorities to expand their authority over the provision of cable service to regulate interstate information services – which, like interstate telecommunications services, have never been subject to State or local regulation. The Communications Act generally gives the Commission "plenary authority" over interstate communications, while denying it jurisdiction over intrastate communication services provided by any carrier.[34]

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[33] H.R. Rep. No. 104-204, Part 1, 104th Cong., 1st Sess. 93 (1995).

[34] Louisiana Public Service Commission v. FCC, 476 U.S. 355, 360 (1986), citing 47 U.S.C. §§ 151, 152(b).

In the area of telephone and telecommunications services, the scope of federal preemptive authority has not always been clear "because virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service," and "because the same carriers provide both interstate and intrastate service."[35] But cable modem service is a wholly interstate service that includes no intrastate carrier service. In these circumstances, the Commission's plenary preemptive jurisdiction is clear.

Section 621 authorizes franchised cable operators to occupy the public rights-of-way with their cable systems. Whatever interest the franchising authority may have in managing this use of the rights-of-way is satisfied and protected by Section 621, which requires operators to ensure

> (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.[36]

The Commission should make clear that, in these circumstances, local governments have no legitimate reason, and no authority, to require cable operators to obtain an additional franchise in order to provide interstate cable modem service. The only purpose and effect of any additional franchise requirement would be to prevent – or impose regulatory conditions on – the provision of interstate cable modem service. Section 621, by granting cable operators the right to use and occupy the rights-of-way, precludes franchising authorities from imposing such conditions.

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[35] Id.

Moreover, any such regulation or barrier to the provision of cable modem service would, in any event, be directly at odds with the federal policy against regulation of Internet services, as set forth in Section 230 of the Act. That section establishes that "it is the policy of the United States . . . to preserve the vibrant competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[37] CFA suggests that this provision is somehow inapplicable to regulation of cable modem service. But their own arguments, as well as the language of the provision, clearly demonstrate that it does apply.

In establishing its deregulatory policy for "interactive computer services," Congress specifically defined that term to include "any information service. . . that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet."[38] That clearly encompasses providers of cable modem service.

According to CFA, Section 230 has "nothing to do with the Commission's Title II regulation of telecommunications services . . . . The context makes it clear that Congress intended this policy to apply to those providing information services and deploying innovative new services and content on the Internet."[39] But the Commission has determined that cable modem service is an information service and is not a

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[36] 47 U.S.C. § 541(a)(2).

[37] Id., § 230(b)(2).

[38] Id., § 230(f)(2) (emphasis added).

[39] CFA Comments at 21 (emphasis added).

telecommunications service. Ergo, even according to CFA's own gloss on the statute, the policy of Section 230 applies to – and preempts regulation of – cable modem service.[40]

B. Local Governments Are Entitled To Compensation for the Use of Rights-of-Way by Cable Operators – but Compensation is Limited by Section 622.

The cities argue strenuously that they are entitled to "rent" for the use of public rights-of-way by cable operators to provide cable modem service. But again their arguments are misdirected. Nobody disputes that local governments may charge cable operators a fee in connection with the use of the rights-of-way, provided that they are authorized by their states to do so. As discussed above, Section 621, which requires cable operators to obtain a franchise, provides that any such franchise is deemed to authorize the use and occupancy of the rights-of-way for the construction and operation of a cable system. And Section 622 of the Act specifically provides that local governments may impose a franchise fee in return for such authorized use of the rights-of-way.

But Section 622 specifically limits the total fees that may be collected by all governmental entities to five percent of the cable operator's gross revenues from the operation of the system "to provide cable services." This is the amount that Congress has determined as the maximum compensation to which cities should be entitled for the use of their rights-of-way. The cities make no effort to show that the amount that they

[40] CFA's comments are, in large part, a verbatim repetition of its comments on the Commission's Notice of Inquiry on the provision of broadband access to the Internet over wireline facilities (CC Docket No. 00-23) – which explains why many of its arguments seem curiously misdirected and misconceived in this proceeding.

receive from cable operators pursuant to this provision is less than a fair amount for what they characterize as "rent."[41] To put it mildly, that would be a difficult showing to make.

In 1985, one year after Congress enacted Section 622, the cable industry's total gross revenues from the operation of cable systems was $8.831 billion – which meant that cities were entitled to $441.5 million in franchise fees. In 1996, when Congress amended the franchise fee cap to exclude gross revenues from services other than cable services, gross revenues had more than tripled, so that cities were entitled to $1.385 billion in franchise fees. By 2001, this amount, based solely on gross revenues from the provision of cable services and not including cable modem service revenues, had skyrocketed to $2.183 billion:[42]

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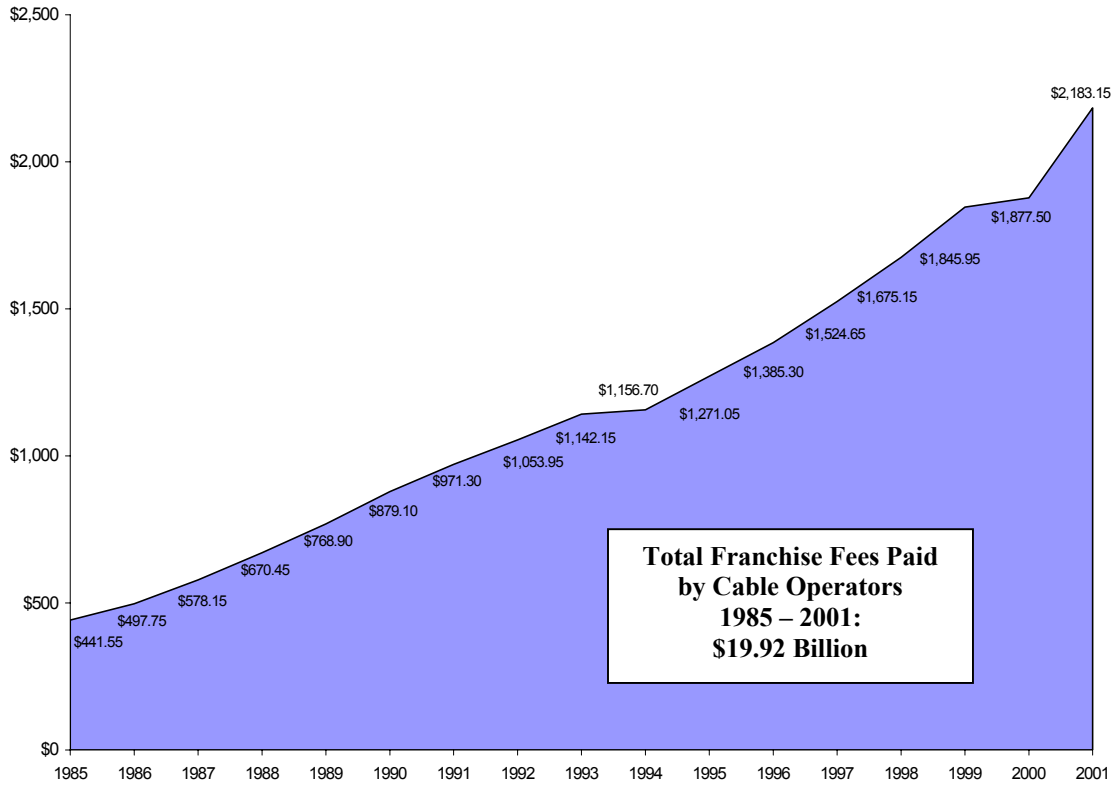
[41] Although Section 622 does not limit the amount of franchise fees to the costs associated with regulating or managing the use of the rights-of-way, ALOAP's assertion that cities have some inherent constitutional right to receive reasonable "rental" compensation for use of public rights-of-way in excess of such regulatory costs is wrong. See ALOAP Comments at 49-53. The Supreme Court cases cited by ALOAP certainly don't stand for that proposition. In St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893), the Court suggested that, as a matter of statutory construction, a state's broad grant of authority to localities to "regulate" telegraph companies encompassed the right to charge a "rental" for use of the rights-of-way. Nowhere did the Court suggest that the amount of this regulatory rental fee should be the "fair market value" of the occupied rights-of-way, and subsequent cases have largely rejected the notion that cities are entitled to "fair market" rent as opposed to recovery of regulatory costs. See generally Gardner F. Gillespie, "Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators," 107 Dick. L. Rev. (forthcoming 2002).

Indeed, in Postal-Telegraph Co. v. City of Richmond, 249 U.S. 252, 260 (1919), cited by ALOAP, the Court upheld a fee imposed on the placing of poles on municipal rights-of-way by a telegraph company not because the fee represented "fair market value" but because it was "reasonably proportionate" to the costs incurred by the city in inspecting and regulating the placement and use of the poles. Moreover, the only case cited by ALOAP for the proposition that a federal statute authorizing use of rights-of-way constitutes a Fifth Amendment taking is a century-old state court case. See Postal Telegraph Cable Co. v. City of Newport, 76 S.W. 159 (Ky. 1903). In that case, a telegraph company argued that a federal statute authorizing it to place its poles in municipal rights-of-way relieved it of any need to obtain permission from (and pay fees to) the city for such use of the rights-of-way. That is a far cry from the present case, in which cable operators are required by Section 621 of the Communications Act to obtain franchises from their local franchising authorities in order to occupy and use the public rights-of-way, and franchising authorities are entitled, in return, to regulate the use of such rights-of-way and collect franchise fees.

[42] This is nine times the Commission's budget for 2002. See FCC, FY 2003 Budget Estimates to Congress, Feb. 2002, p.7.

Franchise Fees Paid by Cable Operators
1985 – 2001
(in million)



The five-fold increase in franchise fees since 1985 has nothing to do with any increased costs of regulating cable systems or managing the rights-of-way, nor is there any reason to suspect that there have been any such increased costs. The cities offer no basis for concluding that five percent of gross revenues from the provision of cable service – a steadily growing amount – is not exceedingly generous compensation for the use that cable operators make of public rights-of-way. They seem to think that fair compensation entitles them to a partnership share in all revenues received by cable operators from all sources – without, of course, bearing any of the risks associated with any such sources.

Congress, in 1996, decided otherwise. It allowed the amounts received by cities to continue to grow as cable operators continue to expand their cable service offerings with, for example, digital tiers, pay-per-view and video on demand. But it determined that as cable operators seek to develop new services outside the scope of the definition of "cable service," the revenues from those services should not be included in assessing franchise fees. This decision may deprive cities of the windfall that they were anticipating from new sources of cable revenue. But it does not deprive them of fair and reasonable compensation for the use of public rights-of-way.[43]

In any event, it is what Congress decided. The cities half-heartedly attempt to argue that although the 1996 amendment specifically excluded from franchise fee calculations all revenues other than revenues from the provision of cable services, Congress meant only to exclude revenues from the provision of "telecommunications services." But that is flatly inconsistent with the plain language of the statute.

The cities point to legislative history indicating that Congress expected that cities would separately recover fees from the provision of telecommunications services from all providers of such services, including cable operators.[44] It is, in fact, the case that cities may recover a fee from telecommunications providers (if authorized to do so by their states), including telecommunications providers who are also cable operators – if the fee

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[43] Thus, even if it were true that, as ALOAP contends, the provision of cable modem services increases the burden that a cable system places on public rights-of-way, this would not entitle them to any additional fees or other compensation. See ALOAP Comments at 41-42. Nor would it require franchised cable operators – who are already entitled to use the rights-of-way – to obtain an additional franchise. But, in any event, cable modem service does not generally place any greater burden on the cities' rights-of-way. As several cable operators who have deployed such service will show in their reply comments, the upgraded facilities that are used to provide cable modem service are also used to provide upgraded digital cable service. The provision of cable modem service does not result in the use of rights-of-way that would not otherwise be used for the provision of cable service and places no unique additional facilities on public rights-of-way.

[44] See ALOAP Comments at 45.

is assessed on all providers in a nondiscriminatory manner and is consistent with the limitations of Section 253 of the Act. Cable operators, of course, pay for their rights-of-way use through franchise fees paid pursuant to Section 622. And, under Section 622(g), "franchise fees" include all fees imposed on cable operators "solely because of their status as such."[45]

This means that, while the five percent cap applies not only to fees imposed pursuant to cable franchise agreements but to any fees assessed specifically on cable operators by any governmental entity, it does not apply to fees of general applicability assessed on the provision of information or telecommunications services. But those fees that are imposed as "franchise fees" are limited by the plain language of the statute to five percent of revenues from the provision of "cable services" – which excludes revenues from the provision of information and telecommunications services.

Moreover, as NCTA and others showed in their initial comments, even though fees of general applicability fall outside the scope of Section 622, the imposition of such fees specifically on the provision of Internet access services by cable operators and others would be barred by the Internet Tax Freedom Act.[46] The cities contend that a fee imposed on Internet access providers by cities would be outside the scope of the Internet Tax Freedom Act's prohibition,[47] but the language of the Act proves otherwise.

The prohibition applies to "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed

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[45] 47 U.S.C. § 542.

[46] See NCTA Comments at 53; Comments of AOL Time Warner, Inc. at 36; Comcast Comments at 30; Cox Comments at 51-52.

[47] See ALOAP Comments at 56-57.

for a specific privilege, service, or benefit conferred."[48] As a general matter, this would appear to cover any separate assessment on cable operators in connection with their provision of Internet services. As discussed above, franchised cable operators are already entitled, pursuant to Section 621, to occupy public rights-of-way with their cable systems. Therefore, they would receive no additional "privilege, service, or benefit" in return for any separate fee imposed on the provision of Internet service.

In any event, Congress made clear that, at least for purposes of this statute, franchise fees are not deemed to be imposed "for a specific privilege, service, or benefit conferred." Congress specifically provided, in an "exception" to the definition, that the prohibition would not apply to "any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573)."[49] If such franchise fees were not within the scope of the language of the general prohibition, Congress would not have needed to create an exception to exclude them. And since any fees that might be imposed on the provision of Internet services would be outside the scope of Section 622, they would also be outside the scope of the exception and would be prohibited.

C. Franchising Authorities May Not Impose Customer Service Requirements on the Provision of Cable Modem Service.

ALOAP contends that because the customer service provisions of Section 632 of the Act authorize franchising authorities to establish and enforce "customer service requirements of the cable operator" and do not limit that authority to requirements related to the provision of "cable service," local governments have carte blanche to impose

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[48] Pub.L. No. 105-277, § 1104(8)(A)(i), 112 Stat. 2681 (1998) (reproduced at note to 47 U.S.C. § 151).

[49] Id., § 1104(8)(B).

customer service obligations on any service that a cable operator might choose to provide. Congress went to great lengths, however, to make clear that the provisions of Title VI were not intended to affect the allocation of jurisdiction with respect to non-cable communications services provided by cable operators. There is nothing in the Act or legislative history that suggests that the customer service provisions of Section 632 created an exception to this rule.

The relevant language authorizing franchising authorities to enforce "customer service requirements of the cable operator" was included in the original language of Section 632, as enacted in the Cable Communications Policy Act of 1984. And the language and legislative history of that Act emphasize that the Act's provisions were meant to allocate regulatory responsibilities and authority with respect to the provision of "cable service" by cable operators but were intended to "preserve[] the regulatory and jurisdictional status quo with respect to non-cable communications services."[50]

The legislative history thus makes clear that the law was intended to "maintain[] existing regulatory authority over all other communications services offered by a cable system, including the lucrative private line voice and data transmission services that could compete with communications services offered by telephone companies."[51] Under ALOAP's interpretation of the statute, Section 632 would require the Commission to adopt and empower local franchising authorities to enforce customer service standards

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[50] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 29 (1984). See Section 3 of the 1984 Act: "The provisions of this Act and amendments made by this Act shall not be construed to affect any jurisdiction the Federal Communications Commission may have under the Communications Act of 1934 with respect to any communication by wire or radio (other than cable service, as defined in section 602(5) of such Act) which is provided through a cable system, or persons or facilities engaged in such communications." Pub. L. No. 98-549, § 3, Oct. 30, 1984, 98 Stat. 2779, reproduced in the notes under 47 U.S.C. § 521 (emphasis added).

[51] H.R. Rep. No. 98-934, supra, at 29.

for these commercial services simply because they are provided by a cable operator. Yet nobody has ever thought that cities had the power to regulate – or that the Commission's customer service standards might apply to – these services.

Thus, the only reasonable reading of Section 632, consistent with the legislative history and language of the Act, is that its provisions authorize local franchising authorities to enforce customer service standards, as promulgated by the Commission, with respect to the provision of cable service. With respect to the provision of non-cable services, Title VI is not a source of regulatory jurisdiction for local franchising authorities. And local franchising authorities have no authority elsewhere to regulate cable modem service. As discussed above, the "regulatory and jurisdictional status quo," which Congress intended to preserve, is that the Commission has plenary jurisdiction over interstate communication services.

The Commission should make clear that state and local governments have no authority under Section 632 to enforce customer service requirements for cable modem service and are preempted from doing so. Such regulation would not only be at odds with the statute and with its policy, in Section 230, against regulation of Internet services but would also frustrate the deployment of high-speed broadband service – which, under Section 706 of the Telecommunications Act of 1996, the Commission has a mandate to encourage.

To the extent that customer service for cable service and cable modem service are intertwined – for example, where customers receive a single bill for both services, or where customers initially call the same local phone number to inquire about either service – the existing standards regarding billing practices and telephone responses will remain

applicable and will not interfere with the provision of cable modem service. But many customer service issues involving cable modem service are wholly different from the relatively routine, recurring issues that local cable systems' customer service representatives and technicians deal with every day. Many are dealt with on a national level, by a phone bank of technicians who answer calls and resolve problems from customers served by systems in many different locations. It would be impossible and make no sense to subject this provision of customer service to a multiplicity of local requirements.

Moreover, as we noted in our initial comments, many cable operators are choosing to offer their customers a choice of several ISPs, each of which may have its own national or regional arrangements for resolving customer service issues. Here, too, a patchwork quilt of local regulations and requirements would hopelessly complicate the provision of such multiple services to subscribers.

In an emerging marketplace in which the potential number of high-speed Internet subscribers far exceeds current penetration, and in which cable faces head-to-head competition from telephone companies and other providers of Internet access, there are strong incentives to ensure that poor customer service does not deter growth or cause customers to turn to a competitor. And, in any event, cable modem service providers would not be exempt from the generally applicable consumer protection laws that states enact to prevent and provide remedies for fraudulent or improper conduct by all businesses serving consumers.

But rules and standards specifically governing cable modem service are beyond the jurisdiction and purview of state and local governments. They would interfere with

the deployment and operation of the service, and the Commission should make clear that they are preempted.

IV. CALEA DOES NOT APPLY TO CABLE MODEM SERVICE PROVIDERS.

The Federal Bureau of Investigation asks the Commission to clarify that cable operators offering cable modem service are subject to the Communications Assistance for Law Enforcement Act ("CALEA"), notwithstanding the classification of cable modem service as an information service.[52] CALEA, however, applies to "telecommunications carriers." 47 U.S.C. § 1001(8). The Commission has made clear that cable modem service is not a telecommunications service, and that cable operators, in providing cable modem service, are not carriers. Accordingly, cable operators providing Internet access via high-speed cable modem service are not subject to CALEA's provisions.

This does not mean, of course, that law enforcement agencies cannot obtain information from providers of cable modem service. Statutes such as the Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.* ("ECPA") apply to all ISPs, including cable operators acting as ISPs. Moreover, the USA PATRIOT Act recently amended the Cable Act to harmonize the Cable Act's privacy provisions (Cable Act § 631, 47 U.S.C. § 551) with ECPA so that uniform standards would apply to law enforcement access to email and similar services provided by cable operators and other ISPs.[53]

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[52] See Comments of Federal Bureau of Investigation.

[53] Also, in some cases a cable operator may choose to use the capabilities of its system to offer telecommunications services as a common carrier. CALEA would apply in those circumstances, and the cable industry has already established a technical specification that defines how cable operators using the PacketCable® architecture for this purpose may comply with CALEA. The FBI has recognized the PacketCable® electronic surveillance specification as a "Lawfully-Authorized Electronic Surveillance Standard." See http://www.askcalea.net/programs/.

CONCLUSION

As a matter of policy, the costs of regulating cable modem service far outweigh any conceivable benefits. In the absence of regulatory impediments, marketplace forces are resulting in the rapid, competitive deployment of high-speed Internet access services nationwide. And that deployment is fostering the development of new, unique content on the Internet, all of which is available to cable modem customers. Regulation is not necessary to ensure the competitive availability of Internet content, applications and services. Its only effects would be to deter investment, interfere with deployment, and raise the costs of such services.

In any event, as a matter of law, the Commission and state and local governments have minimal authority to regulate cable modem service. The regulatory implications of the Commission's determination that cable modem service is an interstate information service (and not a telecommunications service or a cable service) are straightforward and determined by the Communications Act. As an information service, cable modem service is not subject to regulation under Title II of the Act, nor does the Commission have ancillary jurisdiction to impose multiple ISP obligations or other common-carrier types of regulation on the provision of such service.

Cable modem service is not subject to regulation as a cable service under Title VI. Moreover, local franchising authorities are preempted from regulating the provision of this interstate communication service on any other basis. They may not require a separate franchise for the provision of such service. They may not impose additional fees on the provision of such service. And they may not regulate the manner in which cable modem service is provided.

In sum, this is a case in which the legal and public policy imperatives are congruent. The law generally precludes regulation of cable modem service, and that is precisely the result that will best ensure that cable modem service is rapidly deployed and made available in a manner that meets the needs and demands of consumers at affordable prices.

Respectfully submitted,

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